

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

DA 96-1073

In the Matter of)	
)	
Petitions for Waiver and Partial)	RM-8181
Reconsideration or Stay)	
of Inmate-Only Payphones)	
Declaratory Ruling)	
)	

ORDER

Adopted: July 3, 1996

Released: July 3, 1996

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On February 20, 1996, the Commission released a Declaratory Ruling holding that inmate-only payphones are customer premises equipment (CPE) and ordering carriers to reclassify accounting information associated with such service by September 2, 1996.¹ Four petitions² have been filed with the Commission requesting that the actions required by the Declaratory Ruling be stayed or waived pending the effective date of new rules that must be adopted for all payphones pursuant to Section 276³ of the Telecommunications Act of 1996.⁴ In this Order, we deny the requests in part and grant them in part.

¹ See *In the Matter of Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, Declaratory Ruling, RM-8181 (released February 20, 1996) (Declaratory Ruling).

² On March 21, 1996, Bell Atlantic Telephone Companies, BellSouth Telecommunications, NYNEX Telephone Companies, and Pacific Bell and Nevada Bell jointly filed a "Petition for Partial Reconsideration or Stay" (Joint Petition) of the Declaratory Ruling. On March 21, 1996, Pacific and Nevada Bell (Pacific) and Southwestern Bell Telephone Company (SWBT) each filed a "Petition for Waiver" of the Declaratory Ruling. Similarly, on April 5, 1996, Cincinnati Bell Telephone Company (Cincinnati Bell) filed a "Petition for Reconsideration and Stay" of the Declaratory Ruling.

³ See *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-128 (released June 6, 1996).

⁴ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 96 (1996) (codified at 47 U.S.C. §§ 151 *et seq.*).

II. PETITIONS

2. Four petitions and various comments, pleadings in opposition, and petitioner replies were filed.⁵

3. The Joint Petition asks the Commission to reconsider and stay the effectiveness of the Declaratory Ruling until rules implementing Section 276 are adopted. Joint Petitioners state that, if they are not granted a stay, compliance with the Declaratory Ruling and the rules resulting from the Section 276 proceeding will result in duplicative activities within a short period of time. Specifically, since Section 276 will likely require accounting changes for all payphones, petitioners contend that it is superfluous to make such changes now solely for inmate-only payphones. The Joint Petition further states that it will be difficult to comply with the time frame established in the Declaratory Ruling because the only way for most carriers to identify inmate-only payphones would be through a manual review of their records and, in some cases, a physical inspection of the inmate facility. Moreover, the Joint Petitioners assert, compliance would also require them to "modify their accounting and time reporting records by adding more than twenty new financial codes" and to train "thousands of employees on the correct use of new codes."⁶

4. The Joint Petition also notes that for a local exchange carrier (LEC) to provide inmate-only payphones as unregulated CPE, it must have "an effective tariff for new unbundled network services -- payphone access lines -- to allow it to connect these stations to the telephone network."⁷ The Joint Petition states that under the Commission's rules⁸ technical information about this new service must be disclosed twelve months, and at a minimum six months, before the service is introduced. Thus, petitioners contend, the September implementation date in the Declaratory Ruling is impossible to meet.

5. Southwestern Bell Telephone (SWBT), in a separate petition, contends that there is a conflict between the Declaratory Ruling and Section 402(b)(2)(B) of the Telecommunications Act of 1996. Specifically, the former requires that "LECs file a revision to their CAMs [Cost

⁵ The Joint Petition filed by Bell Atlantic, BellSouth, NYNEX, and Pacific Bell (Joint Petition) presents most of the arguments addressed in the other petitions for stay or waiver. The latter are discussed only to the extent they raise arguments not presented in the Joint Petition.

⁶ See Reply in support of Petition for Partial Reconsideration or Stay, filed by joint petitioners on May 28, 1996.

⁷ See Petition for Partial Reconsideration or Stay, filed by joint petitioners, on March 21, 1996, p. 3.

⁸ *Id.* p. 4, citing *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 3 FCC Rcd 1150, 1164-65 (1988).

Allocation Manuals] on or about July 3, 1996" while the latter states that the "Commission shall permit any common carrier ... to file cost allocation manuals ... annually, to the extent such carrier is required to file such manuals"⁹

6. In its petition, Cincinnati Bell Telephone (Cincinnati Bell) requests a reconsideration and stay of the Declaratory Ruling.¹⁰ Cincinnati Bell argues that in the Declaratory Ruling the Commission did not distinguish between the "nature of competition for services in an area served by a [Bell Operating Company] and those served by smaller carriers."¹¹ It believes that the Telecommunications Act of 1996 clearly intended that such a distinction be made. Cincinnati Bell also contends that Section 276 of the Act only applies to payphone services provided by Bell Operating Companies (BOCs), and that a different regulatory scheme exists for smaller LECs. Cincinnati Bell further contends that the Declaratory Ruling places an unwarranted administrative burden on smaller LECs because inmate-only payphones represent a very small portion of Cincinnati Bell's total payphone service market. Because inmate phone service only accounts for 4% of Cincinnati Bell total payphone service, Cincinnati Bell states that this percentage does not justify the administrative costs that will result from the Commission's regulations. Cincinnati Bell argues that regulation of non-BOC payphone service should be comprehensive rather than focused on one area of service such as inmate payphones. Cincinnati Bell also contends that the Commission should stay implementation of its rules until it considers this issue in a comprehensive manner.

III. DISCUSSION

7. To justify the granting of a stay, the proponent must demonstrate that: (1) absent a stay, it will be irreparably injured; (2) it is likely to succeed on the merits; (3) a stay will not cause harm to other parties; and (4) a stay is consistent with the public interest. *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).¹² As discussed below, petitioners have generally failed to carry this burden, and we therefore deny their requests for stay and waiver of the Declaratory Ruling.¹³

⁹ SWBT at 3.

¹⁰ We address here only the request for stay, and not the merits of Cincinnati Bell's arguments concerning the scope of Section 276. Cincinnati Bell is free to raise those issues in the Section 276 proceeding or in some other appropriate proceeding.

¹¹ Cincinnati Bell at 2.

¹² See also *In the Matter of Deferral of Licensing of MTA Commercial Broadband PCS*, 11 FCC Rcd 3214 (1995), applying the *Holiday Tours* test.

¹³ Petitioners appear to use "waiver" to mean the same as "stay," *i.e.*, to delay the effective date of the Declaratory Ruling. Thus, we are not separately analyzing requests under the *Wait Radio* waiver standard. See *Wait Radio v. Federal Communications Commission*, 418

8. We are staying the requirement that carriers file CAM revisions reflecting the reclassification changes. A stay for this purpose is in the public interest. As suggested by SWBT, Section 402(b)(2)(B) may require revisions to Commission rules regarding CAM filings. The Commission will soon address Section 402 as part of its ongoing implementation of the 1996 Telecommunications Act, and we believe that any action taken here which may seem to prejudge the issues in that proceeding, or which could require the carriers to take actions the Commission might later deem contrary to statutory requirements, would be inappropriate. No parties, moreover, will be harmed by this stay. Carriers are still required to begin separating their costs effective July 3, 1996, and the Commission will have access to those records should questions of cross-subsidy arise. Moreover, while we cannot say that SWBT is *likely* to succeed on the merits, its position does have sufficient merit to warrant consideration by the Commission in the Section 402 proceeding. Thus, although we believe that the harm to carriers in filing their CAM revisions would be *de minimis*, we conclude on balance that a stay of the CAM filing requirement is warranted until further order of the Commission.

9. Joint Petitioners have not satisfied their burden with regard to the relief they seek from the other actions ordered in the Declaratory Ruling. As an initial matter, petitioners have not demonstrated that, absent a stay, they will be irreparably injured. Joint Petitioners contend that if the Section 276 proceeding ultimately requires accounting changes for all payphones, the carriers can simply reclassify the entire group, but that if they reclassify inmate-only payphones separately, they will incur extra expense in determining which payphones are inmate-only and in implementing separate accounting codes for that group. Joint Petitioners, however, have not quantified the expense of these activities or otherwise demonstrated that the activities are unreasonably burdensome. For example, although the Joint Petitioners make general statements in their May 28, 1996 reply statement that compliance will require at least 20 new accounting codes and the training of "thousands" of employees, petitioners provide no information about how long it would take to train the employees, what employees would need to be trained, or how this situation compares with other situations in which an accounting change occurs (i.e., is this normal or unusual).

10. Moreover, Joint Petitioners have provided no information on the number of prisons or of inmate-only payphones involved. Absent information otherwise, we have no reason to assume other than that the number of prisons served is relatively small and that inspection of facilities, if in fact that is required, will not be burdensome.

11. Joint Petitioners have also failed to demonstrate that they are likely to succeed on the merits. Joint Petitioners suggest that the Declaratory ruling erred because it requires them to file tariffs in a time period that is not possible because of requirements that technical information about new services be disclosed six or twelve months before the service is

F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. Federal Communications Commission*, 897 F.2d 1164 (D.C. Cir. 1990).

introduced.¹⁴ The appropriate remedy, however, is not to delay implementation of the Declaratory Ruling, but rather to waive the notice period. The Commission may waive a rule for good cause shown, in whole or in part, on the Commission's own motion or on petition.¹⁵ We conclude that good cause exists here. The purpose of the disclosure requirement is to prevent a BOC from withholding information to the detriment of competition. Here, however, our disclosure requirement would serve only to prolong the ability of Joint Petitioners to classify CPE as regulated equipment. Moreover, nothing in Joint Petitioners' submissions or elsewhere in the record indicates that waiving the time limitations in the disclosure requirements would adversely affect consumers, all petitioners, or competitors. Thus, we exercise our authority under Section 1.3 of our rules and waive this requirement. The LECs will be expected to make any required disclosures of technical information by August 2, 1996.¹⁶

12. Cincinnati Bell is also unlikely to prevail in its contention that the Commission erred in not distinguishing between BOCs and smaller carriers. The Commission based the Declaratory Ruling on longstanding CPE policies -- not the Telecommunications Act of 1996 -- applicable to all LECs. Thus, Cincinnati Bell has described no bar to the Commission's continued application of these policies to carriers such as Cincinnati Bell, or any grounds for the Commission to stay the Declaratory Ruling while it institutes a comprehensive payphone proceeding for non-BOC carriers.

13. Finally, Joint Petitioners have not addressed the questions of the effect of the requested stay upon the public interest or of the harm a stay poses to other parties. We note, however, that the purpose of requiring that CPE be provided on an unregulated basis is to encourage competition and to expand consumer choices.¹⁷ Delay in implementing the Declaratory Ruling not only reduces the ability of other providers to compete with the LECs but also the public's communications options.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and authority delegated in Section 0.91 of Commission's rules, 47

¹⁴ See n.6. For a specific discussion of the time requirement applicable to network disclosure see *Furnishings of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd 143, 150-51, *on recon.*, 3 FCC Rcd 22, 23-24 (1987). See also 47 C.F.R. § 64.702(d)(2).

¹⁵ 47 C.F.R. § 1.3.

¹⁶ We note that the Declaratory Ruling was released in February, and the carriers have already had more than four months in which to begin compliance with any disclosure requirements.

¹⁷ Declaratory Ruling at 2.

C.F.R. § 0.91, and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Petition for Partial Reconsideration or Stay filed jointly by Bell Atlantic, BellSouth, NYNEX, and Pacific Bell and Nevada Bell; the Petition for Reconsideration and Stay filed by Cincinnati Bell; the Petition for Waiver filed by Southwestern Bell; and the Petition for Waiver filed by Pacific Bell and Nevada Bell ARE DENIED to the extent described above.

15. IT IS FURTHER ORDERED that pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and authority delegated in Section 0.91 of the Commission's rules, 47 C.F.R. § 0.91, and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that we stay the requirement that petitioners file their CAM revisions on July 3 1996 consistent with this order; however, carriers are still required to begin separating their costs effective July 3, 1996.

16. IT IS FURTHER ORDERED that pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and authority delegated in Section 0.91 of the Commission's Rules, 47 C.F.R. § 0.91, and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that we waive the network disclosure time requirements applicable to a new unbundled network service to the extent described above.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Regina M. Keeney". The signature is written in a cursive, flowing style.

Regina M. Keeney
Chief, Common Carrier Bureau